FILE COPY

JUN 1 1959
JAMES R. BROWNING, Clerk

In The

Supreme Court of the United States

October Term, 1958

No. 166

PENNSYLVANIA LABOR RELATIONS BOARD,

Petitioner

v.

AUGUST A. NAPOLI, Trading and Doing Business as Seven-Up Bottling Company,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

HERBERT N. SHENKIN
Deputy Attorney General
HARRY J. RUBIN
Deputy Attorney General
ANNE X. ALPERN
Attorney General
Attorneys for Petitioner

State Capitol
Harrisburg, Pennsylvania

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

INDEX

	Page
Petition for Writ of Certiorari:	
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provision and Statute Involved	4
Statement of the Case	5
Reasons for Granting the Writ	8
Conclusion	12
Appendix A—Opinion of the Supreme Court	13

TABLE OF CITATIONS

Cases:

Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, AFL et al. v. Fairlawn Meats, Inc., 353 U.S. 20, 22, 23 (1957) 9

Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957) 8

National Labor Relations Board v. Denver Building and Construction Trades Council, 341 U.S. 675, 684, 685 (1951) 9

National Labor Relations Board v. Fainblatt et al., 306 U.S. 601 (1939) 6, 8, 9

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937) 8

Pennsylvania Labor Relations Board v. Irving J. Friedberg et al., 395 Pa. 294 (1959) 11, 12

STATUTES:

28 U.S.C., Sec. 1257 (3) 2

Labor-Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C., Secs. 141 et seq. 4

Pennsylvania Labor Relations Act, Act of June 1, 1937 (P.L. 1168), 43 P.S. 211.1 et seq. 5

CONSTITUTION:

Constitution of the United States, Art. I, Sec. 8 4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No.

Pennsylvania Labor Relations Board,

Petitioner

v.

August A. Napoli, Trading and Doing Business as Seven-Up Bottling Company,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above-entitled case on April 20, 1959.

CITATIONS TO OPINIONS BELOW

The Nisi Decision and Order Sustaining Jurisdiction of the Pennsylvania Labor Relations Board, hereinafter called the "Board" (R. 151a), and the Final Decision and Order of the Board (R. 160a), are unreported. The opinion of the Court of Common Pleas of Westmoreland County (R. 174a) is reported at 40 Westmoreland Law Journal 169. The opinion of the Supreme Court of Pennsylvania, printed as Appendix A hereto, is reported at 395 Pa. 301.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on April 20, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3), since a ". . . title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

QUESTIONS PRESENTED

I. Does the Pennsylvania Labor Relations Board have jurisdiction over a Pennsylvania soft drink bottler and distributor who has ten (10) employes, where all sales are made inside Pennsylvania, and purchases of supplies for the relevant annual period from outside Pennsylvania, both direct and indirect, amount to $43,879.59?

(a) Is the impact of such a business on interstate commerce *de minimis* within the meaning of applicable decisions of this Court and, therefore, insufficient to bring the enterprise within the jurisdiction of the National Labor Relations Board?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is Article I, Section 8, of the Constitution of the United States:

> "The Congress shall have power . . . To regulate Commerce . . . among the several states. . . ".

The statute involved is the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C., Sections 141, et seq., the pertinent provisions of which are:

> "The (National Labor Relations) Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce . . ." (61 Stat. 146, 22 U.S.C., Section 160 (a))
>
> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (61 Stat. 137, 29 U.S.C., Section 152 (7)).
>
> "The term 'commerce' means trade, traffic, commerce, transportation, or commerce among the several states . . ." (61 Stat. 137, 29 U.S.C., Section 152 (6))

STATEMENT OF THE CASE

After appropriate proceedings under the Pennsylvania Labor Relations Act (Act of June 1, 1937, P.L. 1168, as amended, 43 P.S., Section 211.1 et seq.), the Board issued its Final Decision and Order on September 12, 1957, finding the Respondent guilty of unfair labor practices (R. 160a). The Respondent filed a petition for review in Court of Common Pleas of Westmoreland County (R. 163a), raising, *inter alia*, the question of the Board's jurisdiction in the matter. On May 26, 1958, that Court, without considering the merits, reversed the Board's Order on the ground that the Board had no jurisdiction over the Respondent (40 Westmoreland Law Journal 169; R. 174a). The Board thereupon appealed to the Supreme Court of Pennsylvania which, on April 20, 1959, affirmed (395 Pa. 301, and printed as Appendix A).[1]

The Respondent is a bottler and distributor of a soft drink, Seven-Up, in New Kensington, Pennsylvania (R. 153a). He has ten (10) employes (R. 136a), and for the calendar year 1956 he had total sales of $102,686.24, all inside Pennsylvania (R. 153a). In the same year, his total purchases amounted to $51,384.75, of

[1] It is this case in which certiorari is sought—No. 230 March Term, 1958, in the Supreme Court of Pennsylvania. There were two other cases before the Supreme Court of Pennsylvania—Nos. 229 and 231 March Term, 1958. These involved representation matters and the decision of both courts below in the unfair labor practice case (No. 230) was determinative of the other two cases.

which $7,505.16 represented purchases inside Pennsylvania of products having a Pennsylvania origin (R. 134a). $33,553.24 of the Respondent's 1956 purchases represented shipments to the Respondent from points outside Pennsylvania (R. 132a, 133a), and the remaining 1956 purchases, $10,326.85, represented purchases inside Pennsylvania of products having an out-of-state origin (R. 134a).

In the courts below, the Board contended that the impact of the Respondent's business upon interstate commerce was *de minimis* within the meaning of *National Labor Relations Board v. Fainblatt et al.*, 306 U.S. 601 (1939), and other United States Supreme Court cases; that the National Labor Relations Board did not, therefore, have jurisdiction over the Respondent; and that the Respondent was subject to the Board's jurisdiction. This contention was specifically rejected, both by the Common Pleas Court of Westmoreland County and the Supreme Court of Pennsylvania. The Supreme Court held that the business of the Respondent ". . . 'affects commerce' so that the National Labor Relations Board has exclusive jurisdiction over it in the matter of labor practices even though the National Board would not take jurisdiction because of its jurisdictional minimum."

How Federal Question Is Presented

The Respondent first denied the Board's jurisdiction in his Answer to Complaint (R. 16a), and reiterated this position, contending that the National Labor Relations Board has jurisdiction over the Respondent,

in his Exceptions to the Board's Nisi Order (R. 147a, 148a). The Board rejected this argument on the ground that a labor dispute involving the Respondent would not affect the flow of interstate commerce (R. 155a). The Respondent raised the same jurisdictional question in its Petition for Review in the Court of Common Pleas of Westmoreland County (R. 165a, 166a, 167a); and that Court held that the Respondent's out-of-state purchases were not negligible, that the *de minimis* doctrine was not applicable and that the Board had no jurisdiction in the matter (R. 181a). The same issue was presented on appeal to the Supreme Court of Pennsylvania with the same result (see Appendix A).

REASONS FOR GRANTING THE WRIT

Ever since the passage of the National Labor Relations Act in 1935, there has been confusion in the labor relations field as to the area pre-empted by the Federal Government and the area reserved to the jurisdiction of the several states. Approximately one-quarter of the states have adopted labor legislation more or less modeled on the original "Wagner Act", and until 1957 it was the general practice of these state boards to assert jurisdiction in all cases where the National Labor Relations Board, by the establishment of minimum jurisdictional criteria or otherwise, refused to exercise its jurisdiction.

Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957), and companion cases, decided that the state boards did not automatically become vested with jurisdiction merely because the National Labor Relations Board declined to assert its jurisdiction. This Court, while deploring the creation of a "no-man's land", held that the state boards had no power to deal with cases *where the business involved affected commerce within the meaning of the National Labor Relations Act.*

This Court has made it abundantly clear, from *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937), and the *Fainblatt* case, supra, to the present time, that Congress, in enacting the National Labor Relations Act, intended to and did confer upon the National Labor Relations

Board all of the power of the Federal Government under the Commerce Clause of the Constitution. The *de minimis* limitation on this broad grant of power was first stated by Mr. Justice (later Chief Justice) Stone in the *Fainblatt* case, supra (306 U.S. at 607):

> ". . . Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected *more than that to which courts would apply the maxim de minimis.*" (Emphasis supplied.)

Although this limiting doctrine has been adverted to by this Court on various occasions since 1939 (e.g. *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U.S. 675, 684, 685 (1951); *Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, AFL et al. v. Fairlawn Meats, Inc.*, 353 U.S. 20, 22, 23 (1957)), the Court has not as yet been called upon to stake out that lower boundary.

The determination of what, if any, labor relations jurisdiction is left to the states is obviously an important question. It could be said that practically every business enterprise "affects interstate commerce". If such an approach to the problem prevails, the doctrine of *de minimis* has no practical application; and the various state labor relations laws would be completely inoperative. On the other hand, it can be said that the true test is to ask what will be the effect on interstate commerce if a labor dispute causes

an interruption in the business of the subject enterprise. If this effect is negligible, or *de minimis*, then the states have jurisdiction. The Petitioner believes that this case is one in which such effect is negligible or *de minimis*.

The essential holding of the Supreme Court of Pennsylvania in this case is that a soft drink bottler and distributor, all of whose sales are inside the state and who purchases approximately $44,000 worth of materials annually from outside the state, is not subject to Petitioner's jurisdiction. The court below expressly held that this volume of out-of-state purchases could not be called *de minimis*, and that the respondent was, therefore, under the jurisdiction of the National Labor Relations Board. The Petitioner believes this was error. A soft drink concern of the kind involved here is essentially a local enterprise, of the same character as the corner drug or grocery store or the bakery. The volume of its out-of-state purchases is insignificant compared to the vast flow of goods in interstate commerce, and to say that an interruption in the Respondent's business because of a labor dispute would have any more than a negligible or *de minimis* effect on interstate commerce is to be utterly unrealistic. It should be noted, in this connection, that this Court has never upheld the jurisdiction of the National Labor Relations Board in any case where the impact of the enterprise involved upon interstate commerce was so trivial.

The court below emphasized on two occasions that the Respondent's out-of-state purchases constituted 85 percent of all its purchases. It is submitted that this is completely irrelevant. Even if a company's

total purchases were made out-of-state, it is the volume of such purchases that is material. One hundred percent (100%) of $5,000 is negligible, but 5 percent of $10,000,000 is certainly substantial. The Petitioner brings this matter to the Court's attention because many of the lower courts have emphasized this percentage factor. *Cf.* the decision of the Westmoreland County Court of Common Pleas (R. 176a, 180a, 181a); *PLRB v. Friedberg et al. (No. 1)*, 72 Dauphin Co. Rep. 127, 129, 137 (Pa. 1958).

Fundamentally, the Petitioner maintains that there is a place for the states in the labor relations field, that enterprises such as the one here involved are essentially local in character and their impact on interstate commerce is negligible; and that the effect of the Pennsylvania Supreme Court's decision in this case, as a practical matter, is to give the Federal Government complete jurisdiction over labor relations. If the line cannot be drawn here it cannot be drawn any place, and effective control over labor relations in the small business area must be completely dependent on adequate appropriations from Congress to permit the National Labor Relations Board to operate at the corner-drug-store level.

It is common knowledge that the "no-man's land" question is the subject of active legislative consideration. At this writing there is no assurance that Congress will enact any legislation which will clarify the situation. Under these circumstances it seems to the Petitioner that there are the most imperative considerations for this Court to grant the writ of certiorari in this case.

The Court's attention should also be called to the fact that the instant case is one of two on the same subject decided by the Pennsylvania Supreme Court in the space of one month. In the other case, *Pennsylvania Labor Relations Board v. Irving J. Friedberg et al.*, 395 Pa. 294 (1959), the Pennsylvania Supreme Court, reversing a lower court determination, upheld the Board's jurisdiction on the ground that the effect on commerce of the business there involved was *de minimis*. The *Friedberg* case is presently on direct appeal to this Court (Notice of appeal filed June 2, 1959). By granting the prayer of the present petition, the Court will have before it two cases from the highest court of one state in which the state court drew what it considered to be the line which properly divides the area in which the state may act from that in which it may not. No better opportunity could be presented to this Court to speak with final certainty regarding the power of state labor relations boards to act since application of the *de minimis* doctrine would be squarely in question.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT N. SHENKIN
Deputy Attorney General

HARRY J. RUBIN
Deputy Attorney General

ANNE X. ALPERN
Attorney General

June, 1959.

APPENDIX A—OPINION OF THE SUPREME COURT OF PENNSYLVANIA

Opinion by Mr. Justice Cohen, April 20, 1959:

These appeals were taken by the Pennsylvania Labor Relations Board from decisions of the Court of Common Pleas of Westmoreland County setting aside the orders made by the board in three companion cases.

In the first case, the board made a decision and order sustaining the charge by the General Teamsters Union, Local 249, AFL-CIO that appellee August A. Napoli, trading and doing business as Seven-Up Bottling Company of New Kensington (hereinafter called employer), had engaged in unfair labor practices within the meaning of the Pennsylvania Labor Relations Act of June 1, 1937, P. L. 1168, 43 P.S. §211.1 *et seq.* The second and third cases involved the dismissal by the board of a petition for investigation and certification of representatives which was filed by Brewery and Soft Drink Workers, Local No. 86, of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO. Following these decisions, the employer filed petitions for review of the board's final orders in the Court of Common Pleas of Westmoreland County. The court held that the board had no jurisdiction over the employer and set aside the orders.

The facts are not in dispute. Employer is a distributor of Seven-Up soft drink in New Kensington,

Pennsylvania, and is franchised by the Seven-Up Company in St. Louis, Missouri. The franchise agreement provides that employer must purchase its Seven-Up from the St. Louis company. Also, the St. Louis company may cancel the franchise, if the employer fails to comply with its policies relating to extract, quality control and cleanliness.

Employer had gross receipts of $102,686.24 from his sales to retail stores, clubs, gas stations and vending machines in New Kensington during 1956. His direct purchases from out-of-state suppliers amounted to $33,553.24 and his indirect purchases from outside the state amounted to $10,326.35 during the same year. The total of all his purchases for 1956 was $51,384.75; hence, those which represented out-of-state dealings represented 85% of the total.

The sole question presented by these appeals is whether or not the Pennsylvania Labor Relations Board had jurisdiction over this employer. This is the same question with which we dealt in *Pennsylvania Labor Relations Board v. Friedberg*, 395 Pa. 294, A. 2d (1959): whether or not the employer's business affects commerce as defined in Labor Management Relations Act of 1947, 61 Stat. 137 (1947), 29 U.S.C.A. §152(7) (1952).[1]

Where the activity of an employer affects or may affect commerce, state labor relations boards do not

[1] The term affecting commerce is defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

have jurisdiction over labor disputes. As we pointed out in the *Friedberg* case, the field is pre-empted by the Federal Government which invested the National Labor Relations Board with exclusive jurisdiction and this exclusiveness exists even though the National Board refuses to assert its jurisdiction because of its self-imposed standards. *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); *Hodges Bedding Company v. Pennsylvania Labor Relations Board*, 388 Pa. 333, 131 A. 2d 93 (1957).

There is no question but that the employer in this appeal is engaged in an activity which materially "affects commerce". *National Labor Relations Board v. Seven-Up Bottling Company of Miami*, 196 Fed. 2d 424 (5th Cir. 1952). His business operates under a franchise agreement with a national company and 85% of all his purchases are from out-of-state.

Appellant argues that employer's activities were *de minimis* and hence, is not included in the jurisdiction of the National Labor Relations Board. In the *Friedberg* case we held that a local window washers' activities were *de minimis* and did not "affect commerce", therefore, holding that the Pennsylvania Board's jurisdiction was not ousted. The facts in the instant case clearly show that the employer's business is quite different from that of the employer in *Friedberg*. Here the employer is engaged in a non-retail manufacturing business while in *Friedberg* the employer was engaged in selling a service. Also, in *Friedberg*, the employer's only connection with interstate commerce was indirect—he had no connection with nor was he under the control of any national busi-

ness as the employer in this case. Here the employer is manufacturing and distributing a nationally advertised product and purchases approximately $44,000.00 worth of supplies from outside the state. These differences are basic in the determination of whether or not an employer is engaged in an activity "affecting commerce" within the meaning of the national act.

For the above reasons it is clear to this Court that the employer is engaged in the business which "affects commerce" so that the National Labor Relations Board has exclusive jurisdiction over it in the matter of labor practices even though the National Board would not take jurisdiction because of its jurisdictional minimum.

Orders affirmed.

FILE COPY

Supreme Court, U.S.
FILED
JUL 29 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 166

PENNSYLVANIA LABOR RELATIONS BOARD,
Petitioner,

v.

AUGUST A. NAPOLI, Trading and Doing Business as Seven-Up Bottling Company, Respondent.

BRIEF IN OPPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

JACK J. ROSENBERG,
808 Law & Finance Bldg.,
Pittsburgh 19, Pennsylvania
DAVID E. FELLER,
1001 Connecticut Ave., N. W.
Washington 6, D. C.
S. HAROLD GROSSMAN,
210 Berger Bldg.,
Pittsburgh 19, Pennsylvania
Attorneys for Respondent

SMITH BROS. CO. INC. LAW PRINTERS 416 BLVD. OF ALLIES PITTSBURGH 19, PA.
87

INDEX

	PAGE
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI:	
Counter-Statement of Questions Presented	2
Additional Provision of Statute Involved	2
Additional Statement of Case	3
Argument	4
The Affect on Commerce is not *de minimis*	4
The Volume of Interstate Commerce is Immaterial	6
The National Labor Relations Board Would Have Taken Jurisdiction	8
Congress Has Preempted the Field	10
Conclusion	12

TABLE OF CITATIONS

CASES

Amalgamated Association of Employees v. Wisconsin Board, 340 U.S. 383	7
Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, AFL et al. v. Fairlawn Meats, Inc., 353 U.S. 20 (1957)	5
American Factors Co., 98 N.L.R.B. 447	9
Coca Cola Bottling Co. of Tulsa, 85 N.L.R.B., 606	9
Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957)	5
Howell Chevrolet v. National Labor Relations Board, 346 U.S. 482	9
National Labor Relations Board v. Daboll, 216 Federal 2d 143 (1954, Ninth Circuit), certiorari denied 348 U.S. 971	5
National Labor Relations Board v. Denver Building and Construction Trades Council, 341 U.S. 675 (1951)	5

Table of Citations.

CASES	PAGE
National Labor Relations Board v. Fainblatt, 306 U.S. 601 (1939)	4, 7, 10
National Labor Relations Board v. Stoller, 207 Federal 2d 305 (1953, Ninth Circuit,) certiorari denied, 347 U.S. 919	5
Orange Crush of Puerto Rica, 118 NLRB 217	9
Polish National Alliance v. National Labor Relations Board, 322 U.S. 645 (1944)	9
Raleigh Coca Cola Bottling Works, 80 NLRB 768	9
San Diego Building Trades Council v. Garmon, 359 U.S. 236, (1959)	11
7 Up Bottling Co. of Detroit, 120 NLRB 141	9
7 Up Bottling Co. of Miami, 92 NLRB 1622	8

STATUTE	
Labor-Management Relations Act, 1947, 61 Stat. 136 29 U.S.C. Sections 141 et seq.	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. ....

PENNSYLVANIA LABOR RELATIONS BOARD,
Petitioner,

v.

AUGUST A. NAPOLI, Trading and Doing Business as Seven-Up Bottling Company, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully prays that your Honorable Court refuse to issue a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on April 20, 1959.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does the Pennsylvania Labor Relations Board have jurisdiction over a Pennsylvania soft drink bottler and distributor, who operates under a franchise agreement which is part of a national franchise distribution system and who has ten (10) employees, where all sales are made inside Pennsylvania, and purchases of supplies for the relevant annual period from outside Pennsylvania, both direct and indirect amount to $43,879.59?

(a) Does the maxim, *de minimis non curat lex,* apply to oust the exclusive jurisdiction of the National Labor Relations Board over such an employer?

ADDITIONAL PROVISION OF THE STATUTE INVOLVED

In addition to the constitutional provision and pertinent provisions of the Labor-Management Relations Act, 1947, cited in the petition for writ of certiorari, the proviso to Section 10 (a), of the Act, 61 Stat. 146, 29 U.S.C. Section 160 (a), the introductory portion of which is quoted in the petition, is also pertinent to this case. This proviso is:

> ". . . Provided, that the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation, except where predominantly local in character) even though such cases may involve labor disputes affecting commerce . . ."

ADDITIONAL STATEMENT OF THE CASE

In addition to the statement of the case contained in the Petition, the following facts are relevant:

The Respondent is a manufacturer, bottler and distributor of a nationally advertised soft drink called Seven-Up under a franchise agreement from the parent Seven-Up Company of St. Louis, Missouri, which has similar franchise agreements with manufacturers, bottlers and distributors throughout the United States. It is conceded that the action of Respondent, which was found to be an unfair labor practice under the Pennsylvania Labor Relations Act would also have been an unfair labor practice under the provisions of Section 8 (a) of the Labor-Management Relations Act, 1947.

There has been no agreement between the National Labor Relations Board and the Petitioner ceding to the Pennsylvania Labor Relations Board any jurisdiction whatsoever under the provisions of Section 10 (a) of the Labor Management Relations Act, 1947.

ARGUMENT

The affect on commerce is not *de minimis*.

Petitioner herein is contending that annual out-of-state inflow of $43,879.59, which amount represents approximately eighty-five (85%) percent of the total purchases of the Respondent, a Pennsylvania soft drink manufacturer, bottler, and distributor, who operates under a franchise agreement which is part of a national franchise distribution system, does not "affect commerce" within the meaning of Section 2 (7) of the Labor-Management Relations Act, 1947, in that the same is *de minimis*.

The sole basis upon which Petitioner contends the writ should be granted in this case is the dictum contained in *National Labor Relations Board v. Fainblatt*, 306 U.S. 601 (1939) wherein Justice (later Chief Justice) Stone stated:

> ". . . Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected *more than that to which courts would apply the maxim ae minimis.*" (Emphasis supplied.)

Respondents contends that the writ of certiorari should not be granted even if it were desirable to establish limits for the application of the *de minimis* doctrine, because this is not an appropriate case for establishing such limits, since that doctrine has no application to this case. There is no question that your Honorable Court has repeatedly determined that an inflow of purchases from out-of-state suppliers of approxi-

mately $44,000 is substantial. Petitioner does not contend that there is no affect on commerce in this case; its only contention is that the effect is not substantial, but *de minimis*. It is admitted that the act charged to Respondent constituted an unfair labor practice under Section 8 (a) of the National Labor Relations Act.

In every instance in which your Honorable Court has been called upon to pass the application of the *de minimis* theory in relation to Section 2 (7) of the National Labor Relations Act, the Court has refused to find the doctrine applicable. See *Guss v Utah Labor Relations Board*, 353 U.S. 1 (1957), wherein your Honorable Court determined that less than $50,000.00 out-of-state inflow was not *de minimis* and *Amalgamated Meat Cutters et al. v. Fairlawn*, 353 U.S. 20 (1957), wherein your Honorable Court determined that $100,000.00 out-of-state inflow was not *de minimis*.

In addition, your Honorable Court at 347 U.S. 919 refused certiorari in *National Labor Relations Board v. Stoller*, 207 Federal 2d. 305 (1953, 9th Circuit), wherein the Circuit Court of Appeals held that $12,000.00 out-of-state inflow was not *de minimis*. At 348 U.S. 971, your Honorable Court refused certiorari in the case of *National Labor Relations Board v. Daboll*, 216 Federal 2d 143, (1954, 9th Circuit), wherein the Circuit Court of Appeals held that $77,000.00 out-of-state inflow was not *de minimis*. See also *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U. S. 675 (1951).

The Respondent's out-of-state purchases were not so negligible as to remove the business beyond the area of affecting interstate commerce within the meaning of

Section 2 (7) of the National Labor Relations Act. This is particularly true in relating the Respondent's out-of-state inflow of $44,000.00 to the current jurisdictional standards of the National Labor Relations Board as the same applies to non-retail establishments. The National Board will now assume jurisdiction of such establishments, if there is either $50,000.00 inflow or outflow. The relationship of $44,000.00 to $50.000.00 (88%) is substantial rather than *de minimis*. There can be no question but that if Respondent's purchases from out of the state were $7,000.00 more, or if the National Labor Relations Board had lowered its jurisdictional standards, as it has the right to do, by $7,000.00, the Board would have taken jurisdiction in this case if requested to do so.

The Volume of Interstate Commerce is Immaterial.

Since the Guss case, supra, there is no longer any question that a State Board does not have jurisdiction in a case such as this. As Chief Justice Warren stated in that case:

> "We hold that the proviso to Section 10 (a) is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board . . ."

and referring to *Amalgated Association of Employees v. Wisconsin Board,* 340 U.S. 383, your Honorable Court further stated:

> "In a footnote to the first sentence quoted above the Court cited Section 10 (a) and described its authorization to cede jurisdiction only where the state law is consistent with the national legislation as

insurance that the national labor policy will not be thwarted *even in the predominantly local enterprises to which the proviso applies*". (Emphasis supplied.)

"And here we find not only a general intent to preempt the field, but also the proviso to Section 10 (a) with the inescapable implication of exclusiveness."

In the *Fainblatt* case itself, supra, upon which Petitioner bases its request for the writ, your Honorable Court established the exclusiveness of the National Labor Relations Board's jurisdiction regardless of the amount of commerce involved. There your Honorable Court stated:

"Nor do we think it important, as respondents seem to argue, that the volume of the commerce here involved, though substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hitherto engaged our attention. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small . . .

"The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commmerce involved . . .

"The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor

disturbances affecting interstate commerce. Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume.

". . . In this, as in every other case, the test of the Board's jurisdiction is not the volume of the interstate commerce which may be affected, but the existence of a relationship of the employer and his employees to the commerce such that, to paraphrase Section 10 (a) in the light of constitutional limitations, unfair labor practices have led or tended to lead 'to a labor dispute burdening or obstructing commerce.'"

The National Labor Relations Board Would Have Taken Jurisdiction in This Case Had it Been Requested to Do So.

Respondent further contends that this is not an appropriate case for delimiting the *de minimis* theory, since Respondent is a manufacturer, bottler and distributor of a nationally advertised product under a franchise from an out-of-state producer of the basic product (syrup) from which respondent manufactures the ultimate product. The St. Louis, Missouri basic producer has granted similar franchises to many other bottlers and distributors throughout the United States. In 7 *Up Bottling Co. of Miami*, 92 N.L.R.B. 1622, affirmed by the Fifth Circuit Court of Appeals, 196 Federal 2d 424, the Board took jurisdiction where the dealer had only $82,000.00 of purchases from out of the State of Florida, at a time when its jurisdiction standards called for $500,000.00 of out of state inflow. The employer there

was a franchise affiliate of the same company as Respondent. The Court there, holding that the employer was an integral part of a multi-state enterprise said:

> "Respondent (7 Up Bottling Co.) is an affiliate of a group of manufacturers of this product (7 Up) in numerous states, operating under a franchise granted by the parent firm in St. Louis, Missouri. The product is marketed under a nationally advertised trade mark."

The National Labor Relations Board has frequently affirmed this principle that a locally franchised bottler and distributor of a nationally advertised and marketed soft drink was an integral part of a multi-state enterprise. See *American Factors Co.*, 98 N.L.R.B. 447; *7 Up Bottling Co. of Miami, supra; Raleigh Coca Cola Bottling Works*, 80 NLRB 768; *Coca Cola Bottling Co. of Tulsa*, 85 NLRB 606; *Orange Crush of Puerto Rica*, 118 NLRB 217; *7 Up Bottling Co. of Detroit*, 120 NLRB No. 141. The Supreme Court of the United States has also affirmed the principle that a franchised dealer of a nationally advertised commodity is an integral part of a multi-state non-retail enterprise. See *Howell Chevrolet v. National Labor Relations Board*, 346 U.S. 482.

In *Polish National Alliance v. N.L.R.B.* 322 U.S. 645, (1944) your Honorable Court, speaking through Mr. Justice Frankfurter said:

> "... in this Act, (the National Labor Relations Act) ... Congress has explicitly regulated not merely transactions of goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce.

> . . . Whether or not practices may he deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative affect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which, if left unchecked may well become far-reaching in its harm to commerce. *Labor Board v. Fainblatt,* supra at 607-608."

Congress Has Preempted the Field.

Petitioner complains that if the *de minimis* doctrine is not applicable here, there is little place for state boards in the labor relations field. That this may be so, would not be because of a decision in this case, but because the Congress of the United States has preempted the field and because the National Labor Relations Board has not seen fit to cede jurisdiction to the State Board as it is authorized by Congress to do by Section 10 (a) of the Act. The National Board has never entered into an agreement with any state agency pursuant to Section 10 (a) of the Act. Likewise, as Petitioner states in the first paragraph of the portion of the Petition setting forth reasons for granting the writ, approximately three-fourths of the States have not adopted labor legislation modeled on the original "Wagner Act". In all those states, in the states which have State Boards in the area of the "no man's land" established by the Guss Case, and in all other cases, where, as here, Section 10 (a) of the Act might be applicable to permit the State Board to exercise jurisdiction if that section had been used by the National Board, the State Boards do not

have jurisdiction. A refusal of certiorari in this case would not enlarge this area in which the State Boards have no jurisdiction.

Further, the fact that the highest Court of the State of Pennsylvania has found that the effect on commerce was substantial and not *de minimis* should preclude the granting of certiorari here. The Supreme Court of the United States should not be called upon to decide this question on a case by case basis. As stated in the second *San Diego Building Trades Council v. Garmon* case, 359 U.S. 236, handed down by your Honorable Court on April 20, 1959 (the same day the Pennsylvania Supreme Court handed down its decision in this case);

> "In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, or remedy, and of administration. The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts in the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations. To the *National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be ade-*

quately fashioned only by legislation and administration. . . ." (Emphasis Supplied)

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the Taft-Hartley Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. (Citations omitted) Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."

CONCLUSION

Respondent therefore submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK J. ROSENBERG
DAVID E. FELLER
S. HAROLD GROSSMAN
Attorneys for Respondent

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 27 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959
No. 166

PENNSYLVANIA LABOR RELATIONS BOARD,
Petitioner

v.

AUGUST A. NAPOLI, Trading and Doing Business as Seven-Up Bottling Company,
Respondent

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

HERBERT N. SHENKIN
Deputy Attorney General
ANNE X. ALPERN
Attorney General
Attorneys for Petitioner

State Capitol
Harrisburg, Pennsylvania

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.
George W. Schaeffer, Representative, 2921 Penn Avenue, West Lawn, Reading, Pa. (OR 8-7078)

TABLE OF CITATIONS

Cases:	Page
Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, A.F.L. et al. v. Fairlawn Meats, Inc., 353 U.S. 20 (1957)	3
Guss, etc. v. Utah Labor Relations Board, 353 U.S. 1 (1957)	2
Guss etc. v. Utah Labor Relations Board et al., 5 Utah 2d 68, 296 P. 2d 733 (1956)	3
Howell Chevrolet Co. v. N.L.R.B., 346 U.S. 482 (1953)	5
N.L.R.B. v. Fainblatt et al., 306 U.S. 601 (1939)	2
N.L.R.B. v. Seven-Up Bottling Co. of Miami, Inc., 196 F. 2d 424, 426 (C.A. 5, 1952)	4
N.L.R.B. v. Stoller et al., 207 F. 2d 305 (C.A. 9, 1953), cert. den. 347 U.S. 919 (1954)	3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 166

Pennsylvania Labor Relations Board

Petitioner

v.

August A. Napoli, Trading and Doing Business as Seven-Up Bottling Company,

Respondent

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Petitioner respectfully submits this Reply Brief to the Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania in the above entitled case.

The only purpose of this Reply Brief is to correct certain misstatements of fact and prejudicial inferences contained in the Respondent's Brief in Opposition. The Petitioner deems it necessary to bring these matters to the Court's attention in order that the certiorari petition be fairly considered.

Preliminarily, it should be noted that the Respondent characterizes the *de minimis* reference in *Fainblatt*[1] as a *dictum* (p. 4, l. 14).[2] The negligibility or *de minimis* principle as applied to the Commerce Clause of the Constitution and decisions involving the substantiality of the effect of an enterprise on interstate commerce can hardly be termed a *dictum*. It is a fundamental legal concept which this Court has repeatedly recognized. See Petition, p. 9, ll. 2-22.

The Respondent states that this Court in *Guss*[3] "... determined that less than $50,000.00 out-of-state inflow was not *de minimis* ..."[4] This is simply not the case. The appellant in *Guss* was a manufacturer of specialized photographic equipment for the Air Force on a contract basis. Although it is true that his out-of-state purchases were "... a little less than $50,000. ..."[5], he shipped his finished products "... *to Air Force bases, one within Utah and the others outside.* ..."[6] Neither this Court's opinion nor that of the lower court discloses the exact amount of the out-of-state sales involved, but it can reasonably be assumed that such sales were quite substantial.[7]

---

[1] *NLRB v. Fainblatt et al.*, 306 U.S. 601 (1939).

[2] Page and line references not otherwise identified are to the Respondent's Brief in Opposition.

[3] *Guss, etc. v. Utah Labor Relations Board*, 353 U.S. 1 (1957).

[4] P. 5, ll. 13-14.

[5] 353 U.S. at 4.

[6] Ibid. Emphasis supplied.

[7] The record in *Guss* apparently contained no breakdown of the sales figures. The decision of the Utah Labor Relations Board is unreported.

The total amount of the appellant's contracts with the government or its agencies was $152,025.50.[8]

The Respondent also states that this Court in *Fairlawn* ". . . determined that $100,000.00 out-of-state inflow was not *de minimis*."[10] This statement is reasonably accurate as to *direct* out-of-state inflow, but the Court specifically makes it clear that *indirect*[11] out-of-state purchases were $100,000 or more.[12] The NLRB accumulates direct and indirect inflow for jurisdictional purposes, the Respondent has done so for the purposes of the present proceedings, and the precedents should be treated accordingly.

In like vein, the Respondent cites the *Stoller* case,[13] in which this Court refused certiorari, as a holding by the United States Court of Appeals for the Ninth Circuit that ". . . $12,000.00 out-of-state inflow was not *de minimis* . . ."[14] However, the business involved in *Stoller* was a laundry and dry cleaning establishment on an atomic energy reservation operated by the Atomic Energy Commission as a part of

---

[8] *Guss etc. v. Utah Labor Relations Board et al.*, 5 Utah 2d 68, 296 P. 2d 733 (1956).

[9] *Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, AFL et al. v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957).

[10] P. 5, ll. 16-17.

[11] "*Indirect inflow* means the purchase of goods or services which originated outside the employer's state, but which he purchased from a seller within the state." NLRB Release R-576; 1 *CCH Labor Law Reporter* (4th Ed.), § 1610.

[12] 353 U.S. at 22.

[13] *NLRB v. Stoller et al.*, 207 F. 2d 305 (C.A. 9, 1953), cert. den. 347 U.S. 919 (1954).

[14] P. 5, ll. 21-22.

the national defense program. This was the controlling factor in the case, and *Stoller* is not a clear-cut authority that $12,000 inflow is not *de minimis* under the law.

The Respondent also maintains that the present case is not an appropriate one "for delimiting the *de minimis* theory" because he operates under a franchise from a national manufacturer. The Respondent contends that the National Labor Relations Board has jurisdiction in such a case irrespective of the amount of interstate commerce involved.[15]

In the first place, it should be noted that in all of the cases cited by the Respondent the amount of out-of-state inflow involved was quite substantial, ranging from over $300,000 to a minimum of $68,000 in one case. It is, therefore, obvious that the assumption of jurisdiction by the NLRB[16] was based on the immediacy and substantiality of the impact of the business involved on interstate commerce; the franchise factor was secondary and unnecessary to the decision.

Furthermore, although reference is made in these soft drink bottling cases to the fact that the company involved is an "affiliate of a group of manufacturers . . . in numerous States, operating under a franchise" and that the product "is marketed under a nationally advertised trademark," it is significant that the only

---

[15] Pp. 8-10.

[16] "And the confirmation of this jurisdiction by United States Court of Appeals for the Fifth Circuit in *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 196 F. 2d 424, 426 (C.A. 5, 1952).

case on point in this Court concerned a retail Chevrolet dealer franchised by the General Motors Corporation.[17] The sweeping nature of the franchise in the *Howell* case is in sharp contrast to the facts in the instant case. The franchised automobile dealer is "closely supervised", must "make varied and detailed reports about his business affairs", "devote full time to Chevrolet sales", "keep his sales facilities at a location and conduct the business in a manner that satisfied General Motors", "permit General Motors to inspect Howell's books, accounts, facilities, stocks and accessories", and "keep such uniform accounting systems as General Motors might prescribe."[18] It is not surprising that this Court, after referring to the ". . . Many other terms of the agency agreement (which) also emphasized the interdependence of Howell's local and General Motor's national activities",[19] upheld the NLRB's finding that Howell was an integral part of General Motors' national system of distribution.

The only evidence adduced in the present case with respect to the Respondent's franchise from the Seven-Up Company of St. Louis is that the Respondent is obligated to buy all its extract from the St. Louis Company; that the latter has certain inspection rights as to the product and the cleanliness of the Respondent's establishment, and that the Respondent must maintain distribution to at least 75% of the accounts in his territory who handle Seven-Up.

---

[17] *Howell Chevrolet Co. v. NLRB*, 346 U.S. 482 (1953).

[18] 346 U.S. at 483.

[19] Ibid.

The Petitioner submits that this type of franchise arrangement is a far cry from that closely knit relationship which exists in the automobile field, and that, absent facts which show that the business of the enterprise involved has a substantial effect on interstate commerce, the assertion of Federal jurisdiction should not be predicated upon the franchise factor.

CONCLUSION

The Petitioner submits that the Respondent has advanced no substantial reason to justify a refusal to grant the writ of certiorari prayed for in this case.

Respectfully submitted,

HERBERT N. SHENKIN
Deputy Attorney General

ANNE X. ALPERN
Attorney General

August, 1959.